

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Date: April 4, 2000

Case No: 1999-LHC-1525

OWCP No: 07-138555

In the Matter of:

JOANN BEATY,

Claimant,

vs.

AVONDALE INDUSTRIES, INC.,

Employer.

APPEARANCES:

WILLIAM KENNETH HAWKINS, ESQ.

On behalf of the Claimant

WAYNE ZERINGUE, ESQ.

On behalf of the Employer

Before: LARRY W. PRICE

Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Joann Beaty (Claimant) against Avondale Industries, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing in Metairie, Louisiana on October 12, 1999. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.¹

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. SYNOPSIS

Claimant suffered a work related injury to her left knee. Compensation and medical benefits were voluntarily paid culminating in payment for a scheduled injury. Claimant alleges her right knee was injured while she was recovering from her left knee injury. Claimant asserts she remains temporarily totally disabled and is entitled to full TTD benefits including medical treatment for the right knee. Employer assert the right knee injury is not causally related to the left knee injury and that suitable alternative employment has been identified. Thus Claimant should be limited to payment for a scheduled injury.

II. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 1999-LHC-1525 (JE-1):

1. Jurisdiction of this claim is under the LHWCA, 33 U.S.C. §901 et seq. On or about February 16, 1996, Claimant was employed by Avondale Industries, Inc. as a shipbuilder.
2. Date of injury/accident: February 16, 1996 (left knee).
3. Injury occurred within the course and scope of the employment: Yes, left knee.
4. Employer/Employee relationship existed at the time of the accident: Yes at time of the left knee injury.
5. Employer advised of the injury on February 16, 1996.
6. The Notice of Controversion (LS-207) filed: 03/18/98, 09/21/98, 01/15/99.
7. Date of Informal Conference: Held on January 12, 1999.

¹ References to the transcript and exhibits are as follows: Transcript - Tr. ____; Claimant's Exhibits - CX.____, p.____; Employer's Exhibits - EX. ____, p. ____; Joint Exhibits - JE. ____.

8. Average weekly wage at the time of the injury: \$465.24.
9. Nature and extent of disability: Disputed.
 - a) Temporary Total Disability: 2/20/96 - 2/12/97, 4/30/97 - 8/19/98 @ \$310.16/week
 - b) Temporary Partial Disability: 8/20/98 - 1/6/99 @ \$123.49/week
 - c) Total Temporary Compensation Paid: \$46,997.87
 - d) Permanent Partial Disability: 8% to left leg = \$7, 146.00
 - e) Medical benefits paid: \$53,455.70
10. The date of maximum medical improvement: Disputed.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant has never graduated from high school and has not completed the requirements for obtaining a GED. After leaving school, she entered the Job Corps and learned electronics. After working in electronics, she moved to New Orleans and obtained her clerk typist II certification. Since that time, she has worked as a darkroom technician and as an electrician. While at Avondale, Claimant worked in the electrical department connecting junction boxes, telephones, smoke detectors, radar detectors and navigational equipment on vessels which were being overhauled. An electrician would be assigned to complete all the installations in a given compartment. That would involve obtaining the equipment and completing its installation. Claimant's full tool bin weighed 30 to 40 pounds but she generally only carried 8 to 10 pounds though the course of the day. She testified that she was not required to carry the equipment which was being installed as it would be positioned by another craftsman. In order to perform the installations, she would have to climb, squat, bend, kneel and walk. In order to get from the shore to the work area, Claimant might climb as few as eight steps or as many as 350 steps. (Tr. 9-20).

Claimant was injured on February 16, 1996. At the time of the accident, she was working in the house of a LSD which was in wetdock 2. She was in the process of crossing a hall when she became entangled in a temporary power cable and struck her left knee against a blower and the deck. After the accident, she reported to First Aid and was seen by Dr. Mabey. He sent her home for three days in order to allow the swelling to subside. When it did not improve, he sent Claimant to Dr. Russo for an examination. Dr. Russo performed an MRI and recommended that Claimant undergo surgery based upon the results. Claimant filled out a choice of physician form and had the surgery performed by Dr. Levy on either June 4th or 5th, 1996. (Tr. 19-25).

After the surgery, Claimant returned to work while undergoing rehabilitation at West Jefferson. After performing the rehabilitation, Claimant's condition did not improve. According to her testimony, the condition of her left knee continued to deteriorate. She also testified that she returned to full work in January 1997. Upon her return to work, she was assigned to the *Bob Hope*, a new construction. Work aboard the vessel involved climbing many steps and having to walk the

half mile long, steeply inclined deck. After two months, Claimant began having problems with swelling in the left knee. As a result, Dr. Levy ordered a new MRI of the left knee which showed a fresh tear in the knee. This mandated a second surgery on the left knee which was performed in June 1997. Dr. Burvant was initially scheduled to perform the surgery; however, he became sick and Claimant selected Dr. Sketchler as a replacement.² Following the surgery, Claimant again underwent rehabilitation of the knee with little success. At one point, a TENS unit was tried but Claimant indicated that part of the problem was the trouble which she was beginning to experience from her right knee. (Tr. 25-30).

During the physical therapy for her left knee, Claimant began over compensating with her right knee. At the time, she was performing squats and stair climbing exercises. As her left knee would tire, she would try to support more weight with her right knee. These problems began two to three months after the second left knee surgery. Claimant also indicated that she had experienced problems with the right knee following the first surgery. When she returned to full duty on the *Bob Hope*, she would experience difficulty with the constant need to climb stairs and the inclined deck. According to her testimony, she informed both Dr. Sketchler and Dr. Levy of the problems with her right knee. Though Avondale refused coverage, Dr. Levy did treat her right knee problems. (Tr. 30-35).

Dr. Levy returned Claimant to light duty following the right knee MRI but Employer was unable to offer Claimant work within her restrictions. As a result, she was terminated from Avondale. At the time of the formal hearing, Claimant was receiving treatment for her left knee but not her right knee because of Employer's refusal of coverage. Claimant testified that Dr. Levy wanted her to undergo surgery on her right knee. She experiences swelling in each knee about once per week. (Tr. 35-41).

On cross-examination Claimant testified that she had been involved in two automobile accidents. The first was in 1995 and the second was on February 8, 1999. In both cases, she suffered back injuries. Claimant testified that she was capable of returning to light duty work as of April 20, 1998. She feels that her restrictions have changed since that time because of the worsening of her right knee condition. Because of its current condition she did not feel capable of performing any work. Claimant did not dispute that the first time she reported the right knee problem to Dr. Sketchler was on February 19, 1998. (Tr. 41-48).

Claimant testified, with some confusion, that the last day she worked for Employer was about a year prior to her date of termination. She also conceded that she had submitted a falsified resume when she applied to Avondale. It indicated that she had completed high school when in fact she had only completed the ninth grade. (Tr. 49-54). Claimant disputed that as a foreman in the electronics department she was not required to perform kneeling and bending. If anything, she felt that more might be involved. She also disputed Dr. Russo's claim that she had not complained of right knee problems in 1997. According to her, Dr. Russo did not record it until February 19, 1998, because

² Dr. Levy was no longer performing surgery at this time because of health problems.

he is an untrustworthy company doctor. According to Claimant, she told Dr. Sketchler about the right knee in March or April 1997 and Dr. Levy in 1998. Claimant testified that neither doctor ever preformed a physical examination of her right knee. According to her, the right knee was not injured in a work-related accident while on the job at Avondale. (Tr. 55-62).

Claimant testified that she only contacted one of the jobs listed in Nancy Favaloro's labor market survey. When she called Human Resources she was informed that they were not hiring. As a result, she did not submit an application. Claimant did testify that she was capable of occasionally mowing her own lawn so long as she was wearing the knee brace on her left knee. Claimant went on to indicate that she was able to work within certain restrictions and would be willing to work if a job was offered to her. (Tr. 62-68). Clarifying the inconsistencies in her testimony, Claimant stated that she could not work a normal job but could work a job within her restrictions. (Tr. 78).

When asked about the incident involving a car she pushed, Claimant testified that she had not been able to push the car. She stood under a tree while the car was being moved. Prior to the actual moving of the car she had tried and had been unsuccessful in pushing the car. (Tr. 69).

Testimony of Nancy Favaloro

Mrs. Favaloro initially met with Claimant on May 26, 1998. Following the meeting, a labor market survey was performed and sent to Dr. Russo and Dr. Levy for commentary. On July 30, 1999, a functional capacity evaluation was performed by Dr. Levy. According to the Dictionary of Occupational Titles, he indicated that Claimant was capable of performing light duty work with walking or standing up to one hour per workday, continual sitting, and lifting up to 20 pounds for no more than three hours. Dr. Levy also indicated that Claimant was capable of performing overhead work. Claimant was restricted from the use of foot pedals and driving as part of her employment but she was capable of performing an eight hour work day. Claimant should also avoid kneeling, squatting and climbing. Dr. Levy and Mrs. Favaloro both felt that Claimant was capable of finding electronics type work which would fit her restrictions. This did not include the ability to return to work for Avondale as it was too strenuous given her physical restrictions. (Tr. 84-87).

When questioned about whether or not Dr. Levy's prohibition against driving at work was inconsistent with the video surveillance films, Mrs. Favaloro indicated that Dr. Levy's prohibition generally meant driving all day not just to the store and back. (Tr. 89-91).

Two labor market surveys were performed. The first was performed on June 23, 1998, and those types of jobs continue to remain available. In support of this continued availability, she pointed to the letter dated August 4, 1999, in which Dr. Levy approved several job possibilities. His approval of those positions was dated October 11, 1999. (Tr. 91-96).

The following positions from the June 23, 1998, labor market survey were approved by Drs.

Russo and Levy (EX.5, pp.11-22):

- 1) Computrols - patient registration clerk - wages are \$7.00 to \$7.50 per hour.
- 2) Digicourse - electro-mechanical assembler - wages are \$6.50 per hour with possible overtime.
- 3) Shuart Associates - receptionist - wages are \$8.00 per hour.

The following positions from the August 4, 1999, labor market survey were approved by Dr. Levy (EX.13):

- 1) Powertronic Systems - electronics assembler - wages are \$7.00 to \$8.00 per hour.
- 2) Holi Services - dispatcher - wages are \$8.00 per hour.
- 3) West Jefferson Medical Center - clerk/receptionist - wages are \$7.00 to \$8.00 per hour.
- 4) Westbank Machine Shop - receptionist - wages are \$6.00 per hour and up.
- 5) Kentwood Spring Water - receptionist - wages are \$6.50 per hour.

Testimony of David Duhon

Mr. Duhon is the workers' compensation manager for Litton Avondale Industries. He testified that an employee who is out of work for a year, regardless of the reason, is cleared from the payroll. This was the reason for Claimant's 1998 termination as she had last work on April 29, 1997. Claimant was last employed by Avondale in the electrical department from February 1997 until April 29, 1997. Mr. Duhon had spoken with her on April 27, 1998, about returning to light duty at Avondale. Based on her restrictions, the electrical department was unable to offer her light duty employment. Because of the waiting list for light duty employment, Claimant was unable to secure employment prior to clearing the payroll on April 29, 1998. Other than hearing about her EEOC claim, Mr. Duhon has had no contact with Claimant since she cleared the payroll. (Tr. 96-105).

Deposition of Dr. Russell Levy³

Dr. Levy, an expert in orthopedics, first examined Claimant on April 3, 1996. On February 16, 1996, she had tripped at work and injured her left knee. Dr. Levy testified that she had been given a 5% permanent impairment by another doctor but he thought that her impairment was more significant. After the failure of conservative treatment and a knee brace, he performed an arthroscopy of her left knee. The damage that he discovered was consistent with the type of injury she had suffered. After the surgery, Claimant underwent physical therapy and was never completely successful in rebuilding her left leg muscles. Eventually a second surgery was performed by Dr. Sketchler and Dr. Burvant. Again, the pathology of the damage was traced to the original left knee injury. Claimant followed the second surgery with a second round of physical therapy until she began experiencing problems with her right knee. Dr. Levy initially recorded her right knee problems on March 10, 1998. (JE.2, pp.5-10).

³ As Dr. Levy's deposition was submitted on behalf of both parties, it will be designated Joint Exhibit 2.

Dr. Levy testified that the right knee injury was from favoring the left knee injury and putting so much stress on the right knee. An MRI was taken of the knee, but surgery was never performed on the right knee. The pain which Claimant experiences is similar to that which caused the second left knee surgery (knee cap pain) with the possibility of torn cartilage. Dr. Levy was of the opinion that Claimant will have to undergo surgery at some point in the future for the right knee condition. In his opinion, the right knee is suffering from an overuse syndrome combined with the natural aging process. There is a possibility that Claimant had a predisposition to degeneration in the cartilage which was exacerbated by the stress of compensating for the injury to the left knee. When asked to rate Claimant's current impairment, Dr. Levy indicated that Claimant was limited to sedentary work and had a 15% impairment to both lower extremities. Claimant could occasionally bend, kneel and crawl but these activities should not be performed all day due to the arthritis in her knees. (JE2., pp.10-13).

On cross-examination Dr. Levy clarified his statement regarding Claimant's right knee arthritis. He indicated that it was not found on the MRI but a physical examination found evidence of chondromalacia (arthritis under the knee cap). Dr. Levy testified that the same type of arthritis which he found could be caused by the natural aging process. He also indicated that there were no medical records dealing with her knees prior to the accident so he was unable to rule out the possibility that she had arthritis prior to the accident. Dr. Levy's referral for right knee surgery is based on the combination of the torn medial meniscus, which was demonstrated on the MRI, and her arthritic condition. He was able to confirm that the first complaints of right knee pain were made to Dr. Sketchler in February 1998 and to himself on March 10, 1998. In his opinion, the torn meniscus was contributed to, but not caused by, the overuse syndrome. In fact, he was unable to say with certainty what had caused the torn meniscus. For someone possessing a normal meniscus, a limping process alone would not cause it to tear. (JE.2, pp.14-20).

Dr. Levy remains of the opinion that Claimant can return to work so long as the job fits her restrictions. This is the same opinion which he expressed on July 30, 1999. Claimant has the ability to sit for up to eight hours a day but is limited to one hour of walking. She is limited from lifting greater than 20 pounds and can only work intermittently above her shoulders. Because of the aggravation it could cause to the knees, Dr. Levy restricted her from jobs which involve the use of foot pedals. In his opinion, Claimant has not reached maximum medical improvement with regards to the right knee and did not dispute the date supplied by Drs. Russo and Sketchler regarding the left knee. (JE.2, pp.20-27).

When asked why he had not approved the video transfer production position on the August 4, 1999 labor market survey, Dr. Levy indicated that it would involve more up and down movement than he thought was acceptable. If it was truly sedentary in nature, he would not have a problem with Claimant performing the job. In Dr. Levy's opinion, Claimant was capable of performing jobs with

her restrictions as of the date of maximum medical improvement for her left knee. This opinion encompassed the physical abilities and limitations of both knees. (JE.2, pp.27-31).

Because of his feeling that Claimant's torn meniscus was not directly caused by the overuse syndrome, Dr. Levy indicated it was possible that she had a tear in the right knee which pre-existed the left knee injury. Dr. Levy testified that Claimant had never informed him that she had an inequality in the length of her legs. He further testified that though he had never measured their lengths, an inequality could cause the tear. Dr. Levy clarified his earlier statement and indicated that the MRI only showed the possibility of a tear. (JE.2, pp.31-37).

During the deposition, Dr. Levy was asked to study the video surveillance which was shown at the formal hearing. According to Dr. Levy, Claimant "walks pretty good." When asked about the portion where she was helping to push the car, he responded that it was not a job she should do since it would stress her knee. Dr. Levy also did not see any indication that she was favoring her left knee during the pushing of the car. (JE.2, pp.34-36). After watching the tape, Dr. Levy indicated that Claimant did not demonstrate any of the limping which he noted in her office visits. He would keep her sedentary but definitely increase her walking above one hour a day. Based on the tapes, Dr. Levy testified that Claimant exhibited a normal walking gait and did not favor either knee. With such a normal gait, she should not have sustained any type of overuse syndrome or meniscus tear. Based on the tapes, Dr. Levy saw no indication of a tear and there was no corroborative hard evidence demonstrated on the MRI tape which either the radiologist or Dr. Levy could find. If the tear did not exist, the arthritic condition was insufficient to justify knee surgery for the right knee. (JE.2, pp.37-43).

Deposition of Dr. Katz⁴

Dr. Katz, an expert in orthopedic surgery, was retained by Employer to offer a second opinion regarding the causation of Claimant's right knee problems. On September 22, 1999, Claimant's right knee was examined and x-rays were taken. Prior to the examination, Dr. Katz reviewed the medical records of Drs. Levy, Russo and Sketchler. During the examination, a history was recorded which indicated that Claimant had injured her left knee on February 16, 1996, and had undergone two surgeries as a result. Dr. Katz testified that Claimant had reached maximum medical improvement by the time of his examination and most likely at some point prior to his examination. According to Claimant's history, the right knee began hurting shortly after her second left knee surgery. The pain was throbbing in nature with some cracking, popping and stiffness. (EX.14, pp.4-12).

During the physical examination of Claimant's right knee, several x-rays were obtained. Dr. Katz testified that Claimant was very uncooperative and complained of pain when asked to bend the right knee slightly; however, while taking a different set of images, Claimant indicated no problem or pain while bending the right knee 90 degrees. This indicated a possibility of exaggeration. Though Claimant limped while walking in the office, Dr. Katz testified that it must have been slight based on

⁴ Dr. Katz's deposition will be entered into to the record as Employer's Exhibit 14.

the way he worded his report. Generally he found that the muscles of her right leg did not demonstrate any atrophy compared to the left leg. This was consistent with what he expected to find given her two left leg surgeries. During palpitations of the right knee, Claimant express pain at even the slightest movement. The pain was generally centered over the patellofemoral joint. Claimant was unable to fully extend her knee in a seated position but had no problem with full extension while laying on the examining table. This represented a second inconsistency to Dr. Katz. In his opinion, Claimant was either being less than truthful about her symptoms or trying to exaggerate them. The objective findings of the examination included a mild lateral tilting of the patella, crepitus and grating over the patellofemoral joint. All of the objective findings could be consistent with general aging changes associated with a 51 year old patient. (EX.14, pp.12-19).

The x-rays of Claimant's right knee showed some mild degenerative spurring of the lateral tibial spine. Generally, it takes years to accumulate that type of spurring. The same spurring was evident in the x-rays of Claimant's left knee. Based on the available evidence, Dr. Katz determined that Claimant had right knee patellofemoral pain syndrome. Dr. Katz found no evidence of the right knee meniscus tear which Dr. Levy diagnosed. His opinion was unchanged after studying the MRI report of her right knee. Dr. Katz was able to reproduce pain consistent with patellofemoral pain but unable to reproduce pain which would be associated with a tear. Dr. Katz testified that he has never heard of a case where a limp caused a tear as Dr. Levy diagnosed. In his opinion, the right and left knee problems are not related because over a year and a half had passed before she started complaining of pain in the right knee. Favoring one leg may cause temporary knee problems but not of the significance which Claimant has stated. (EX.14, pp.20-33).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 9990 F.2d 730 (3rd Cir. 1993).

CAUSATION

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once Claimant proves these elements, the Claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326(1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prime facie case, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weight all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

The parties have agreed that Claimant suffered a compensable work-related injury to her left knee on February 16, 1996. There is no agreement as to whether or not her right knee problems are a natural outgrowth of her over compensation for the subsequent weakness in her left knee. Claimant has introduced both her own testimony and that of Dr. Levy to establish that her right knee problems were caused in whole or in part by the overuse syndrome which resulted from the injury to her left knee.

When asked what caused Claimant's right knee problems, Dr. Levy testified that it was a combination of arthritis and the overuse syndrome. His direct testimony reflected the opinion expressed in his chart notes beginning on April 14, 1998, that her right knee problems are the result of overuse syndrome. A study of the March 10, 1996, chart note indicates that Claimant may have been the first to diagnose the cause of the discomfort which she initially reported on February 19, 1996. In his May 5, 1998, June 17, 1998, and February 3, 1999 chart notes, Dr. Levy continued to express the opinion that overuse syndrome, caused by her limp, was at least a partial cause of her right knee problems. (CX.1)⁵ I find that Claimant has demonstrated both an injury and a reasoned medical opinion which establishes that her injury could be the natural result of a work-related injury. Therefore, I find that Claimant has met her burden and is entitled to the Section 20(a) presumption regarding causation.

Employer must produce substantial evidence to rebut the statutory presumption that "the claim comes within the provisions" of the Act. See 33 U.S.C. §920(a). That evidence must be "specific and comprehensive enough to sever the potential connection between the disability and the work environment." Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980, aff'd), 6 BRBS 607 (1977); Butler v. District Parking Management Co., 368 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989)

⁵ Citations will be provided with dates as the exhibit's pages were not properly labeled.

Employer has offered the testimony of Dr. Katz as well as the medical records of Dr. Russo for the purpose of establishing that Claimant's right knee problems are not a natural outgrowth of her work-related left knee injury. Dr. Katz testified that he could find no evidence of a meniscus tear but did find patellofemoral joint pain which could be consistent with age related degenerative changes. The lack of a meniscus tear is partially supported by Claimant's treating physician who diagnosed it based upon an MRI which only suggested, not confirmed, its existence. Dr. Russo indicated that he could not find a connection between the two sets of knee problems. Dr. Katz has never heard of overuse syndrom causing this type of injury though it will occasionally cause short term discomfort. After watching the surveillance tapes, Dr. Katz was certain that her normal gait, as demonstrated in the tapes, could not have caused the injury to the right knee. Based on the opinion of Dr. Katz and Dr. Russo, I find that Employer has introduced sufficient evidence to sever the causal presumption provided by Section 20(a). Therefore, I must consider the record as a whole in order to determine the causation issue.

While the evidence provided by Dr. Levy's direct testimony balances the testimony provided by Drs. Russo and Katz, I find that Dr. Levy's testimony on cross-examination resolves the causation issue in the Employer's favor. After watching the tapes, Dr. Levy indicated that Claimant's gait was normal and did not demonstrate the symptoms which had lead him to his diagnosis of overuse syndrome. Claimant's normal walking gait could not have caused the problems which were thought to have been caused by excessive stress. As Dr. Katz testified, Claimant's knees contained evidence of degenerative spurring which would most likely have pre-existed the original accident to the left knee. The right knee's problems are an out growth not of the left knee injury but the degenerative changes taking place in both knees. Therefore, I find that the record as a whole does not support the inference that Claimant's right knee was causally related to her left knee injury.

NATURE AND EXTENT

Having established work-related injuries to Claimant's left knee, the burden rests with the Claimant to prove the nature and extent of her disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement(MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 2741(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question

of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when her condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981).

Based upon the agreement of Drs. Levy, Russo and Sketchler, I find that Claimant's left knee

injury reached maximum medical improvement on February 19, 1998. (EX.9, p. 1). After reading the medical records of both Dr. Levy and Dr. Russo, I find that they are in agreement that Claimant has sustained some degree of permanent impairment which will extend beyond her date of maximum medical improvement. Employer has paid under the schedule for an 8 percent impairment to the left leg. There is nothing in the record or in the Parties' briefs that would indicate any controversy of this percentage of impairment and I accept it as appropriate.⁶

As a general rule, if an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payments contained in Section 908(c)(1) through (20). The rule that the schedule of payments is exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in Potomac Electric Power Company v. Director, OWCP, 449 U.S. 268, (1980). (hereinafter "PEPCO").

A Claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which Employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991).

In the instant case Employer has met its burden under PEPCO as both the treating physician and Employer's physician have approved suitable alternative employment since June 23, 1998. I find Claimant could reasonably perform the three positions identified and approved from the June 23, 1998 labor market survey given her age, education, work experience and physical restrictions. Therefore, Claimant is limited to a recovery for her left knee as dictated by the schedules provided in the Act.

SECTION 7 - MEDICAL EXPENSES

Claimant has requested that this Court award the cost of the MRI performed on her right knee as well as other medical expenses associated with treating her continuing right knee medical problems. Because the injury to the right knee was found to be not causally related to the original work-related accident, Claimant is not entitled to medical expenses associated with its treatment.

⁶ Dr. Levy indicated in his testimony and his records (prior to reviewing the tapes) that he would assign each lower extremity a 15% permanent impairment. Dr. Russo disagrees and would assign Claimant a 3% whole body permanent partial impairment. After studying the explanations for their respective ratings, I find Dr. Russo's use of the AMA guidelines to be the more persuasive.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

Claimant's claim for additional benefits associated with her right knee injury is hereby **Denied**. Claimant is entitled to compensation for the scheduled injury to her left knee which has been voluntarily paid by Employer in accordance with the Act. Because no further benefits have been awarded, Claimant's attorney is not entitled to either fees or costs.⁷

SO ORDERED.

LARRY W. PRICE

Administrative Law Judge

⁷ Albert Nicaud, Claimant's former attorney, has filed a Petition of Intervention, seeking fees and costs for services rendered in connection with this claim. As further benefits have been denied and costs and attorney fees have not been awarded, the Petition is moot.